(8)

No. 96-8732

In The

Supreme Court of the United States

October Term, 1997

VINCENT EDWARDS, ET AL.

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

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QUESTION PRESENTED

Whether a defendant found guilty of a dual object narcotics conspiracy, based on a general jury verdict which does not disclose the object of the conspiracy of which the jury found the defendant guilty, must be sentenced on the basis of the criminal object carrying the lesser penalty or be given a new trial.

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INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit organization whose members represent persons accused of crime. One of the missions of NACDL is to ensure justice and due process for persons so accused. NACDL has over nine thousand members nationwide, and is affiliated with sixty-eight state and local criminal defense organizations, which have over twenty-eight thousand members. NACDL is the only national bar association devoted exclusively to the concerns of criminal defense lawyers.

Families Against Mandatory Minimums (FAMM) Foundation is a nonprofit, nonpartisan, educational organization that conducts research and advocacy regarding the cost of mandatory minimum sentencing in terms of public expenditures, perpetuation of unwarranted and unjust sentencing disparities, and the transfer of the sentencing function from the judiciary to the prosecution. Founded in 1991, FAMM has over 33,000 members nationwide with 30 chapters in 24 states and the District of Columbia. FAMM conducts sentencing workshops for its members, publishes a newsletter, serves as a sentencing clearinghouse for the media, and researches sentencing cases for pro bono litigation. FAMM does not argue that crime should go unpunished, but that the punishment should fit the crime.

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[1] In accordance with Supreme Court Rule 37.6, undersigned counsel certifies that no counsel for any party authored, in whole or in part, any aspect of this brief. Further, no person or entity, other than amicus curiae, made a monetary contribution to the preparation or submission of this brief.

Amicus Curiae believes that, in deciding this case, the Court will necessarily address a question of substantial importance in federal criminal practice: whether the *type* of controlled substance is an essential element of a conspiracy charge under 21 U.S.C. §846. The answer to this question will implicate how federal conspiracy crimes are charged and submitted to a jury and how a judge may sentence if an individual is found guilty of such a conspiracy. Therefore, the Court's action in this case will impact upon both the type and nature of representation a person charged in such a conspiracy may receive, as well as what sentence such a person may face after guilty plea or verdict in the federal courts. For that reason, both NACDL and FAMM seek to address the interests of defendants who may not be situated precisely as the petitioners in this case, but who are affected by the Court's resolution of this issue. Both organizations believe that they are in unique positions to assist the Court in examining the important constitutional questions raised by this case.[2]

STATEMENT OF THE CASE

A. The Indictment.

Petitioners Vincent Edwards, Karl V. Fort, Reynolds A. Wintersmith, Horace Joiner and Joseph Tidwell were indicted under Indictment No. 93 CR 20024, filed July 27,

[2] Amicus has obtained consent to the filing of this consolidated brief in support of the petitioners from all interested parties. These letters of consent have been filed separately with the Clerk of this Court.

1993, by the grand jury sitting in the United States District Court for the Northern District of Illinois, Western Division. A superseding indictment was filed November 23, 1993, extending the time period referred to in Count One by one day and adding 11 additional counts. The superseding indictment comprises 26 counts, charging 20 defendants, variously, with a conspiracy to possess with intent to distribute, and to distribute, cocaine and cocaine base in violation of 21 U.S.C. §846; possession of cocaine and cocaine base with intent to distribute in violation of 21 U.S.C. §841(a)(1); use of a firearm during and in relation to drug trafficking in violation of 18 U.S.C. §924(c); and being felons in possession of a firearm in violation of 18 U.S.C. §922(g). Joint Appendix (hereinafter, "J.A.") at 1-11.

Count One, the pertinent count of the indictment, charged Petitioners Vincent Edwards, Karl V. Fort, Reynolds A. Wintersmith, Horace Joiner, and Joseph Tidwell – as well as 14 others – with conspiracy to possess with intent to distribute, and conspiracy to distribute, cocaine and cocaine base over a period of time beginning in 1989 and continuing through July 1993. J. A. at 2-7. Count One of the indictment was six pages long with a total of 21 paragraphs. J. A. at 2-7. The first paragraph of Count One charged all fourteen petitioners conjunctively with conspiracy to distribute cocaine and cocaine base, Schedule II Narcotics, in violation of Title 21, U.S.C. §841(a)(1). J. A. at 2-3. The second paragraph of Count One charged each with profiting from illegal sales of large quantities of powder and crack cocaine by purchasing powder cocaine in kilogram and lesser quantities,

cooking the powder cocaine into crack cocaine, and selling both powder and crack cocaine at numerous distribution sites. J. A. at 3. Paragraph three of Count One alleged that it was a part of the conspiracy that the defendants obtained and attempted to obtain large quantities of cocaine in powder form from a variety of suppliers. *Id.* Thus, §846 crimes of conspiracy, related to violations of §841(a), were charged conjunctively in certain paragraphs of Count One and disjunctively in other paragraphs of the same count.[3]

B. The Trial and the Verdict.

Several defendants charged in the indictment pleaded guilty after submitting written plea agreements. All five petitioners before this Court asserted their constitutional right to trial by jury. Record (hereinafter "R") at 711-12. The five petitioners were tried together in a trial which commenced on June 27, 1994, in the United States District Court for the Northern District of Illinois. Evidence was presented during trial that supported a conviction for conspiracy to distribute powder cocaine or cocaine base. *United States v. Edwards* 105 F.3d 1179, 1180 (7th Cir. 1997). The evidence at trial demonstrated that the object of the conspiracy began as cocaine but shifted in early Spring 1992, to cocaine base. *See* Government's Brief on Appeal 8-9.

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[3] Counts Two, Four, Five and Six charged petitioners with various other offenses. The remaining counts of the indictment (Counts 3 and 7-26) charged offenses against parties who are not involved in this appeal.

Before submitting the case to the jury, the trial court instructed the jury "as a matter of law that cocaine and cocaine base are Schedule II Narcotic Drug Controlled Substances." Tr. 3040. Further, the jury was instructed that the Government need not prove an exact amount of cocaine or cocaine base was involved in the conspiracy but only that the conspiracy involved "measurable amounts of cocaine or cocaine base." Tr. 3040. The instructions provided to the jury on the conspiracy charge did not distinguish, either in the definition of conspiracy or in the requirements of the Government's proof, the cocaine conspiracy from the cocaine base conspiracy. Moreover, the court repeatedly emphasized that two different drugs were involved and that the jury could convict the defendants of the conspiracy if measurable amounts of *either drug* were involved since both substances were Schedule II Narcotic Drug Controlled Substances. Tr. 3040.

On July 18, 1994, the jury found all petitioners guilty of Count One of the indictment; petitioners Edwards and Wintersmith guilty of Count Four of the indictment; and petitioner Tidwell guilty of Counts Five and Six of the indictment. J. A. at 20-28.

Because there was no special verdict form or a special interrogatory with respect to this issue, the jury's finding regarding which object or objects of the conspiracy each defendant engaged in cannot be determined. As the Government previously conceded, the jury's general verdict of "guilty" on Count One could reflect its finding that the individual defendants solely possessed cocaine with

intent to distribute or solely possessed cocaine base with intent to distribute, or both.[4] J. A. at 20.

C. The Sentencing

The district court sentenced all petitioners pursuant to the United States Sentencing Guidelines. The court used conspiracy to distribute cocaine base as the underlying offense of conviction applying the preponderance of the evidence as the standard of proof. J. A. at 43-49, 57-62. *See Edwards*, 105 F.3d at 1180.

SUMMARY OF ARGUMENT

The crime of conspiracy is distinct from all other crimes in that the specific agreement between the parties is the required act which defines the offense. No conviction for conspiracy can stand without proof of such a specific agreement and no punishment, therefore, can follow the failure to prove such a specific agreement. Indeed, it is this requirement that keeps the law of conspiracy from slipping into unconstitutional vagueness and overbreadth. Because the law of conspiracy so often nears this line, it has long been understood that

[4] In the court below the government conceded that the trial court instruction empowered the jury to find the defendants guilty on Count One with mere proof on either object – cocaine or cocaine base. The government further conceded that this amounted to a dual object conspiracy. *See* Government's Brief on Appeal at 31.

"[c]onspiracy . . . [is] a darling of the modern prosecutor's nursery." *Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925).

This necessary specific agreement element, in any conspiracy charged under 21 U.S.C. §846, requires pleading and proof of a specific object of the agreement. Under the plain language of this statute, and the plain language and structure of 21 U.S.C. §841, the necessary agreement element of the offense may be satisfied only by pleading and proof of a specific controlled substance rather than of some undefined generalized concept, "controlled substance."

In the instant case, this basic statutory and constitutional requirement was violated by allowing the jury to return a verdict on a charge which named two distinct objects, in the disjunctive, as the agreement element of the crime. An indictment which charges such a dual object conspiracy – or a jury charge which empowers a jury to convict for a dual object conspiracy – is unconstitutional. As the necessary element of a specific agreement is not present, there exists in this case no conviction upon which any sentence may be based.

To hold otherwise would greatly upset the foundations of criminal law, removing the protections of notice and trial by jury, and putting the fact-finding function in the combined hands of prosecutors and judges. Such a sea change in the law would certainly place in the prosecutors' nursery a new toy – previously unknown – that would never be put down.

ARGUMENT

THE SPECIFIC TYPE OF CONTROLLED SUBSTANCE IS A NECESSARY ELEMENT OF A CONSPIRACY CHARGED UNDER 21 U.S.C. §846.

Amicus believes, in order to resolve the issues presented in this case, the Court must necessarily reach the question whether a conspiracy, charged under 21 U.S.C. §846, requires pleading and proof of the specific controlled substance that is the subject of the conspiratorial agreement. The conclusion that such pleading and proof is required is supported by three compelling reasons. First, throughout history the laws of conspiracy have always required specific proof of the agreement between co-conspirators as the necessary act element. This historical requirement is confirmed by the plain language of the statutes that comprise the conspiracy offense in the instant case. Finally, any other reading of the statutes – such as the loose interpretation by the court below – would pose serious threats to the primary constitutional protections of right to notice and right to trial by jury.

I

THE HISTORY OF THE LAW OF CONSPIRACY REQUIRES SPECIFIC PLEADING AND PROOF ON THE ELEMENT OF THE AGREEMENT BETWEEN CONSPIRATORS

In our common law tradition, the crime of conspiracy has existed as a separate substantive crime since the seventeenth century. *See, e.g., Starling's Case,* 82 Eng. Rep.

1039 (1664).[5] That tradition has long held that an agreement as to the object of the conspiracy, and the means to obtain that object, is an essential element of the crime.

The first important English common law statement regarding conspiracy law came in the beginning of that century in *Poulterers' Case,* 77 Eng. Rep. 813 (1611). The English Court of Star Chamber in *Poulterers' Case* held that a conspiracy need not be wholly successful to sustain a conviction because the act of formulating the agreement was separate from the substantive criminal act.[6] *Id.* at 813. That court determined that the crime of conspiracy lay in the unlawful agreement itself rather than in its criminal execution. *Id.* at 813-14. This development signaled the beginning of the common law courts' view of conspiracy as a separate crime punishable even if the agreed act was not completed.[7]

The common law recognized two types of agreement that would constitute a criminal conspiracy: agreements to perform an unlawful act and agreements to perform a lawful act by unlawful means. *Rex v. Jones,* 110 Eng. Rep.

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[5] For detailed accounts of the development of the law of conspiracy, *see generally* B. Pollack, *Common Law Conspiracy,* 35 GEO.L.J. 328 (1947); F. Sayre, *Criminal Conspiracy,* 35 HARV.L.REV. 393 (1922).

[6] The defendants had combined to falsely accuse an individual of robbery, but because it was clearly evident from the facts that the accused was innocent, the grand jury did not indict the alleged thief.

[7] *See generally* K. David, *The Movement Towards Statute-Based Conspiracy Law In The United Kingdom and The United States,* 25 VAND. J. TRANSNAT'L L. 951 (1993). *See also, Development in the Law – Criminal Conspiracy,* 72 HARV.L.REV. 920, 922 (1959).

485, 487 (1832); *see also Rex v. Journeymen Taylors of Cambridge*, 88 Eng. Rep. 9, 10 (1721) ("a conspiracy of any kind is illegal, although the matter about which they conspired might have been lawful for them, or any of them, to do, if they had not conspired to do it"). This requirement of an agreement to either act illegally or act towards an illegal end – or both – has been the *sine qua non* of criminal conspiracy law.

American courts in the federal and state systems have followed the common law understanding of conspiracy. *See Commonwealth v. Hunt*, 45 Mass. (1 Met.) 111, 121-22 (1842); *Pettibone v. United States*, 148 U.S. 197, 203 (1893) (at common law conspiracy is defined as a combination formed to do either an unlawful act or a lawful act by unlawful means).[8] This common law understanding of the agreement element requirement of conspiracy prosecutions has not changed in this century. *See Braverman v. United States*, 317 U.S. 49, 53 (1942) (analysis of the crime of conspiracy is centered on the agreement). Indeed, this Court has this Term reaffirmed that the object of the agreement is the critical element in a conspiracy prosecution. *See Salinas v. United States*, ___ U.S. ___, No. 96-738, 1997 WL 737692 (U.S. Dec. 2, 1997).

In *Salinas*, this Court held that "the partners in the criminal plan must agree to pursue the same criminal objective. . . . " *Id.* at ___, 1997 WL 737692 at *8; *see also*

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[8] *See Deacon v. United States*, 124 F.2d 352, 357-58 (1st Cir. 1941) (discussing early nineteenth-century common law definitions of conspiracy).

Pinkerton v. United States, 328 U.S. 640, 646 (1946).[9] The Court further held in *Salinas* that "[a] conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor." *Id.* at *9.

Although this Court has always recognized that, properly formulated, conspiratorial agreements may be the proper subject of a prosecution, this Court has also regularly noted the thin ice of constitutionality upon which the law of conspiracy skates. In the seminal case, *Krulewitch v. United States*, 336 U.S. 440, 445-451 (1949), Justice Jackson wrote that there is a place for conspiracy prosecutions in the United States legal system in spite of the fact that it is "elastic, sprawling, and pervasive . . . [and a] loose practice" that poses "serious threat to the fairness in our administration of justice." This Court reversed Krulewitch's conviction of violating the White Slave Traffic Act and of conspiring to violate the Act. *Id.* at 445. Concurring in the judgement and opinion of the Court, Justice Jackson stated that "[t]he modern crime of conspiracy is so vague that it almost defies definition." *Id.* at 446. Likewise, Judge Learned Hand, while sitting on the Second Circuit Court of Appeals, commented:

> So many prosecutors seek to sweep within the dragnet of conspiracy all those who have been

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[9] In *Salinas*, the defendant was convicted under the RICO Act, 18 U.S.C. §1962, of conspiracy and bribery in connection with permitting contact visits to federal prisoners incarcerated in county jail.

> associated in any degree whatever with the main offenders. That there are opportunities of great oppression in such a doctrine is very plain, and it is only by circumscribing the scope of such all comprehensive indictments that they can be avoided.

United States v. Falcone, 109 F.2d 579, 581 (2d Cir. 1940).

What this history confirms is that the nature of the specific agreement between conspirators is the only constitutional basis upon which a conviction may stand. Any lesser requirement than proof of a specific agreement allows conspiracy law to slip from a valid and constitutional crime into the unregulated tool of prosecutorial and judicial punishments feared by Justice Jackson and Judge Hand.

II

THE PLAIN LANGUAGE OF 21 U.S.C. §846 MUST BE READ IN LIGHT OF THIS COMMON LAW AND CONSTITUTIONAL HISTORY

The critical dispute in this case is whether the object of a §846 conspiracy may concern an undefined and general "controlled substance" or whether the type of controlled substance must be specifically pleaded and proved. Section 846 conspiracies are punishable only if the object of the agreement, if completed, would constitute a violation of certain Title 21 offenses:

> [A]ny person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

The plain language of this statute, in light of the history of conspiracy law, could not be more obvious: The object of the agreement which necessarily forms the basis of the conspiracy can be defined only by what is punishable under statute. Put another way, a punishable offense under Title 21 provides the only object for which defendants may be convicted for conspiracy.

In the instant case, the Petitioners could be convicted only if they were proved to have agreed to engage in specific conduct regarding a specific drug that is deemed punishable pursuant to 21 U.S.C. §841. In relevant part, that statute states "it shall be unlawful for any person knowingly or intentionally – (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." 21 U.S.C. §841(a). Section 841(b) of the statute prescribes the terms of incarceration for persons who violate §841(a). All of the enumerated punishments in §841(b) are tied to specific types of controlled substances. The statute thus establishes a scheme where the *punishment* for the crime is entirely dependent on the *type* of the controlled substance at issue.

Because §846 identifies the conspiratorial crime only by what is punishable, the indictment must specify the particular "controlled substance" punished by §841(b). It is possible that one who agrees or conspires to "manufacture, etc." more than one type of controlled substance may be involved in two distinct conspiracies with two distinct objects. *See, e.g., United States v. Richardson*, 86 F.3d 1537 (10th Cir. 1996) (conspiracy to possess with intent to distribute methamphetamine and cocaine held

to be two conspiracies with two distinct objects). However, it is the prosecutor who has the power and the duty to adequately charge and prove such a double conspiracy. By the plain language of the statute, as read in light of the history of conspiracy law, determination of the punishable object of such a conspiracy cannot be left to the sentencing judge loosed from the constitutional rights of trial by jury and proof beyond a reasonable doubt.

That §846 requires proof of an agreement about a specific type of controlled substance is further supported by the simple fact that there is no punishment in §846 for a "controlled substance" *qua* "controlled substance." It cannot be credibly argued that there exists any punishment for the crime of possession of a controlled substance, without more, because there is no statutorily prescribed penalty for such a charge. Likewise, there is no statutorily prescribed punishment for the conspiracy to "manufacture, etc." controlled substances without more specific pleading or proof. The specific penalties prescribed in §841(b) relate to very specific offenses; there is no mention in the statutes of any punishment range for distribution of a "controlled substance." The absence of any punishment regimen for a conspiracy regarding a controlled substance without reference to a drug-specific punishment from §841 indicates the necessity of pleading and proof on a particular controlled substance, not just controlled substances generically.

This requirement – that a particular controlled substance be pleaded and proved for a valid §846 conspiracy prosecution – is further supported by this Court's analysis in *Albernaz v. United States*, 450 U.S. 333 (1981). In that case, this Court held that Congress permissibly

intended to allow imposition of consecutive sentences for offenses arising out of a single agreement or conspiracy having dual objectives. In *Albernaz*, the defendants were involved in an agreement to import marijuana and then to distribute it domestically. They were convicted of violating 21 U.S.C. §§846 (conspiracy to distribute) and 963 (conspiracy to import), and sentenced consecutively on each count. In determining whether Congress was permitted to authorize cumulative punishments, this Court applied the double jeopardy analysis announced in *Blockburger v. United States*, 284 U.S. 299, 304 (1932).[10] The Court held that the statutory provisions, which were the basis of the conspiracies charged in *Albernaz*, specified different ends as the proscribed object of the conspiracy – "distribution" *versus* "importation" – clearly satisfying the *Blockburger* test.[11]

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[10] In the application of that double jeopardy standard, the Court noted "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger*, 284 U.S. at 304.

[11] This Court employed a similar rationale in *United States v. Broce*, 488 U.S. 563 (1989). In *Broce* the defendants pleaded guilty to two conspiracy counts and later, at sentencing, contended that only one conspiracy existed, thereby implicating double jeopardy principles that required the conviction and sentence on the second count be set aside. *Id.* at 565. However, this Court upheld the sentences stating that if "a defendant who pleads guilty to a single count admits guilt to the specified offense, so too does a defendant who pleads guilty to two counts with facial allegations of distinct offenses concede that he has committed two separate crimes." *Id.* at 570.

As in *Albernaz*, the charge in the instant case is a dual object conspiracy with two different objectives: one to distribute cocaine and one to distribute cocaine base. In applying the *Blockburger* rule to determine whether there had been the commission of two separate offenses, it must be determined whether each offense requires proof of a fact which the other does not. In proving whether conspiracy to distribute cocaine versus conspiracy to distribute cocaine base has been committed, the Government must prove a separate element in each offense, namely, the type of drug which is the object of the agreement. It is incumbent upon the Government to prove beyond a reasonable doubt that the object of one agreement was cocaine and to further prove that the object of the second agreement was cocaine base. Each of these offenses requires proof of a fact which the other does not: proof that cocaine was the object of the agreement in one instance and cocaine base in the other.

There can be little doubt that two conspiracies, one charging intent to distribute powder cocaine and one charging intent to distribute cocaine base would be treated identically to the statutes in *Albernaz* – Congress could, under a *Blockburger* analysis, prescribe consecutive punishments for the two conspiracies. This would be true even if, as in *Albernaz*, the proof of the two conspiracies was fundamentally the same, as the Government would be required to prove beyond a reasonable doubt *each type* of cocaine involved in each conspiracy.

There is no dispute that under the plain language of the statute, cocaine and cocaine base are distinct and separate controlled substances. *Compare* 21 U.S.C. §841(b)(1)(A)(ii) (cocaine), *with* §841(b)(1)(A)(iii) (cocaine

base). When the Government alleges a conspiracy to possess with intent to distribute cocaine base, it necessarily must prove that some quantity of cocaine base was involved in order to proceed to the harsher punishments established for that drug. *Id.* (a minimum ten year prison term is mandated for crimes involving five kilograms of cocaine powder or only fifty grams of cocaine base). The Government's proof at the guilt-innocence phase of a trial involving a conspiracy under §846 must be different when the allegation is cocaine base as compared to when the allegation is cocaine powder. The proof needed at trial, therefore, is different for the two controlled substances. *See, e.g., United States v. Lewis*, 113 F.3d 487, 492 (3rd Cir. 1997) (*cert. pending*) ("[l]aboratory analysis established that the controlled substance involved was cocaine base"). Thus, if the Government charged two conspiracies in separate counts – one for cocaine powder and one for cocaine base – findings of guilty would constitute separate and distinct violations of the law.[12]

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[12] This distinction is confirmed by the federal drug-possession statute, 21 U.S.C. §844. Section 844 specifically isolates cocaine base as a drug that, possessed in certain quantities, requires a completely different sentence than simple possession of powder cocaine. Thus, the criminal statutes establish a scheme where cocaine powder and cocaine base are explicitly differentiated.

Several courts of appeal have held that this statutory scheme isolates possession of cocaine base as a distinct violation of the law for purposes of §844. In *United States v. Deisch*, 20 F.3d 139 (5th Cir. 1994), the defendant was arrested and charged with a violation of §841. In addition, the trial judge allowed submission of a jury charge of simple possession under §844 as a lesser included offense. In holding that cocaine base was a distinct element of a §844 offense, the court of appeals reasoned

Because powder cocaine and cocaine base are different drugs, an agreement to possess with intent to distribute powder cocaine has as its object a fundamentally different underlying offense than an agreement to possess with intent to distribute cocaine base. Thus, for one to be sentenced under the provisions for powder cocaine, he or she must be found guilty of a measurable quantity of powder cocaine before additional relevant conduct even becomes an issue. *See* 21 U.S.C. §841(b) (terms for sentencing §841 convictions); *see also United States v. Booker*, 70 F.3d 488, 490 n.2 (7th Cir. 1995) (for purposes of sentencing guidelines and for statutory punishment, cocaine and cocaine base are different). For cocaine base sentencing provisions to apply, measurable quantities of cocaine base must be proven at the guilt-innocence phase. *Id.* Alleging violations of either drug, therefore, is an allegation of a separate object. Merely joining the two types of drugs under one conspiracy count does not change the statutory reality that the objects of such an underlying agreement are fundamentally different. *See, e.g., United States v. Richardson*, 86 F.3d 1537, 1553 (10th

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that the indictment clause of the Fifth Amendment necessitated a grand jury indictment. *Id.* at 145. Because a necessary statutory element – cocaine base – was not charged in the indictment, the defendant's sentence for the §844 offense which dealt specifically with possession of cocaine base could not stand. *Id.* at 152. Three other circuits have also held that simple possession of cocaine base is a separate and distinct element of §844. *See, e.g., United States v. Puryear*, 940 F.2d 602 (10th Cir. 1991); *United States v. Michael*, 10 F.3d 838 (D.C. Cir. 1993); and *United States v. Sharp*, 12 F.3d 605 (6th Cir. 1993); *but see United States v. Butler*, 74 F.3d 916 (9th Cir. 1996) (holding that simple possession of cocaine base is not a separate crime under §844).

Cir. 1996) (indictment alleging "methamphetamine and cocaine" alleged two separate offenses); *United States v. Dennis*, 786 F.2d 1029, 1041 (11th Cir. 1986) (conspiracy charging heroin/cocaine trafficking was a dual object conspiracy); and *United States v. Orozco-Prada*, 732 F.2d 1076, 1083-84 (2d Cir. 1984) (conspiracy alleging distribution of "cocaine and marijuana" was a dual object conspiracy). Because cocaine and cocaine base are different objects of a §846 conspiracy, the type of cocaine involved is an essential element of a §846 offense.

III

IN LIGHT OF HISTORY AND THE PLAIN STATUTORY LANGUAGE, THE COURT BELOW ERRED IN REMOVING THE TYPE OF DRUG FROM THE PROTECTIONS OF TRIAL BY JURY AND THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT

Contrary to the weight of tradition and the plain language of the statutes implicated in this case, the court below usurped the power to determine the essential element of what object comprised the conspiratorial agreement:

> [T]here is no problem when the instructions are phrased in the disjunctive because . . . as long as the jury finds that the defendants conspired to distribute *any* drug proscribed by §841(a)(1), the judge possesses the power to determine which drug, and how much.

Edwards, 105 F.3d at 1182 (emphasis original). Contrary to the lower court's statement of the power of a single judge, the question of the type of controlled substance which is the object of the conspiratorial agreement must

be left in the hands of the jury. Any other holding would seriously undermine the constitutional protections afforded individuals charged with crimes in the Fifth and Sixth Amendments to the United States Constitution.

The Government has the power to define the scope of any conspiracy through its indictment. *See Garrett v. United States*, 471 U.S. 773, 798 (1985) (O'Connor, J. concurring). The shields to this prosecutorial sword are the constitutional guarantees of due process, the right to be informed of the nature and cause of the accusation brought by the Government and the right to trial by jury of such accusations. U.S. CONST. amends V, VI. As discussed above, in a criminal conspiracy the specific agreement itself is the actus reas element. *See United States v. Shabani*, 513 U.S. 10 (1994). The object of such agreement must be specifically stated in the indictment either in the conjunctive or charged as separate elements in separate counts of the indictment. Any disjunctive pleading under §846 – or disjunctive instruction to the jury – which states that there are two or more potential objects of the conspiracy simply does not comport with the minimal requirements of the Fifth and Sixth Amendments to the United States Constitution.

This conclusion is reached through two equally important constitutional channels. First, an indictment which does not give sufficient notice to the person charged of the crime or potential punishment he or she faces is fundamentally defective. Second, any jury charge based on such an indictment is defective if it empowers a jury to convict even where the Government has failed to prove beyond a reasonable doubt a critical element of the conspiracy offense.

A. The Requirement of Notice

It has long been understood that the constitutional right to notice of the Government's accusations – through indictment – has two separate functions. As this Court stated in *Russell v. United States*, 369 U.S. 749, 763 (1962), two of the criteria by which the sufficiency of an indictment is to be measured are "first, whether the indictment 'contains the elements of the offense intended to be charged,' and sufficiently apprizes the defendant of what he must be prepared to meet," and secondly, "in case any other proceedings are taken against him for a similar offense whether the record shows with accuracy to what extent he may plead a former acquittal or conviction." *Id.* (quoting *Cochran and Sayre v. United States*, 157 U.S. 286, 290 (1895)); *see also Rosen v. United States*, 161 U.S. 29, 34 (1896); *Hagner v. United States*, 285 U.S. 427, 431 (1932). An indictment which charges a dual object conspiracy to distribute cocaine or cocaine base does not sufficiently notify an accused of the crime for which he or she may be potentially punished, nor does it assist one in determining the crime for which he or she may not again be put in jeopardy.

As discussed above, the plain language of §846, as well as the history of conspiracy law generally, require the government in all instances to identify the particular type of controlled substance in order to validly charge an offense. In the instant case, the Government decided to seek a grand jury indictment naming *two* specific controlled substances. This charging decision prevented it from seeking a conviction on a different, uncharged and unpunishable, conspiracy to distribute controlled substances generally.

The Court's decision in *Stirone v. United States*, 361 U.S. 212 (1960) is instructive in this regard. The defendant in *Stirone* was charged with interfering with interstate commerce through violations of the Hobbs Act. 361 U.S. at 213-14. The indictment had alleged violations of the Hobbs Act by interfering with the flow of sand and other materials to manufacture concrete; the evidence admitted at trial, however, showed a violation through interference with the flow of steel shipments in interstate commerce. *Id.* This Court held that the conviction could not stand because "it was error to submit that question [concerning steel] to the jury and that the error cannot be dismissed as merely an insignificant variance between allegations and proof. . . . " *Id.* at 215. The trial court's actions resulted in a constructive amendment and thus constituted a Fifth Amendment violation. *Id. See also United States v. Leichtnam*, 948 F.2d 370, 379-80 (7th Cir. 1991) (conviction in a §924(c) count premised on an indictment which identified the use and carrying of a specific identified firearm, cannot be supported on the possession of a different firearm without violating *Stirone*); *United States v. Weissman*, 899 F.2d 1111, 1115 (11th Cir. 1990) (RICO conspiracy indictment identifying the RICO enterprise as the "DeCavalcante Family" required the government to prove that specific enterprise); *United States v. Neapolitan*, 791 F.2d 489, 501 (7th Cir. 1986) ("[t]he government through its ability to craft indictments, is master of the scope of the charged RICO conspiracy . . . having set the stage, the government must be satisfied with the limits of its creation").

The indictment here alleged a §846 conspiracy by identifying two distinct controlled substances – powder

cocaine and cocaine base. After testimony, the jury was instructed that in order to convict it need only find petitioners guilty as to either powder cocaine or cocaine base. The court below concluded that the dual object nature of the charge was irrelevant as the actual conspiracy was related to a broader element, namely a "controlled substance." *Id.* at 1182. This reasoning by the Seventh Circuit constituted a constructive amendment because there were in fact two separate and distinct objects that must have been pleaded and proved to the jury beyond a reasonable doubt. Thus, the Seventh Circuit's holding is in conflict with this Court's holding in *Stirone*.[13]

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[13] This result is also supported by the Government's position in the lower courts regarding guilty pleas to dual object conspiracies. The Government has, in dual object conspiracy cases in which a defendant pleads to an indictment alleging a violation of possessing with intent to distribute cocaine *and* cocaine base, sought a sentence under the provisions for cocaine base, even though a defendant was not aware that he or she was potentially pleading guilty to the offense with the harsher punishment. *See, e.g., United States v. Bush*, 70 F.3d 557, 559 (10th Cir. 1995) (Government sought sentence under provisions for cocaine base where plea was to a conspiracy to distribute powder cocaine and/or cocaine base). The court in *Bush* stated that "if a guilty plea or verdict is ambiguous regarding the object of a conspiracy, the appropriate remedy is to remand the case to the district court with directions to hold a hearing and make a finding as to the object of the conspiracy." *Id.* at 561; *but see United States v. McCaskey*, 9 F.3d 368, 371 (5th Cir. 1993) (court sentenced defendants on the "relevant conduct" that involved cocaine base after defendants pleaded guilty only to conspiracy to distribute cocaine powder).

B. The Requirements of Jury Decision and Jury Unanimity

The Fifth Amendment to the United States Constitution guarantees that no one will be deprived of liberty without "due process of law"; and the Sixth, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." *See Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). This Court has held, in *Sullivan v. Louisiana*, 508 U.S. 275, 277-78 (1993), that these provisions require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt. *See also United States v. Gaudin*, 515 U.S. 506, 510 (1995).

"The right to a jury trial includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty.' " *Patterson v. New York*, 432 U.S. 197, 206 (1977); *In re Winship*, 397 U.S. 358, 361 (1970). The ultimate test of "the constitutional validity of any device [indictment charging a dual-object conspiracy] in a given case remains constant: the device must not undermine the fact finder's responsibility at trial, . . . to find the ultimate facts beyond a reasonable doubt." *United States v. Gaudin*, 515 U.S. 506, 515 (1995); *see also County Court of Ulster City v. Allen*, 442 U.S. 140, 156 (1979).

The petitioners in the instant case were convicted of being involved in an agreement, the objective of which was two different ends: (1) to possess with intent to distribute and to distribute cocaine and (2) to possess with intent to distribute and to distribute cocaine base.

This Court has held that, "[w]hen [there exists] a single agreement to commit one or more substantive crimes . . . the precise nature and extent of the conspiracy must be determined by reference to the agreement which embraces and defines its objects." *Braverman v. United States*, 317 U.S. 49, 53-55 (1942). In *Braverman*, the single agreement with many different objectives was charged under one conspiracy statute. The Government argued that a defendant found guilty of one conspiracy that comprised several objects should be sentenced as if he were found guilty of each of those offenses. *Id.* at 51. This Court disagreed and held "the single agreement is the prohibited conspiracy. . . . For such a violation only the single penalty prescribed by the statute can be imposed." *Id.* at 54.

In the instant case, as in *Braverman*, a single conspiracy was charged that included as objects separate statutory offenses. However, in the case before the Court, unlike *Braverman*, the distinct objects were submitted to the jury in the disjunctive rather than the conjunctive. *See id.* at 50 n.1. Further, in the instant case, unlike *Braverman* in which each object carried the same statutory punishment, each object carries very different punishments: under §841(b), the statutory minimum sentence for a given quantity of "cocaine base" is 100 times that for "cocaine." *See, e.g., United States v. Booker*, 70 F.3d 488, 489 (7th Cir. 1995) (defendant held accountable for 500 grams to 1.5 kilograms of cocaine base giving him a base level of 36; in comparison, level 36 is applied to offenses involving 50 kilograms but less than 150 kilograms of cocaine). Therefore, under the principle of *Braverman* that the agreement is the essential element of the conspiracy, and

because under §846 the determination of whether the object of the agreement charged was cocaine or cocaine base is the fundamental question of fact for the jury to decide, the Government was required to plead and prove to the jury one of the two specific objects for conviction or sentence to stand.[14]

In the federal criminal system, courts have consistently held that essential elements of the crimes charged must not only be decided by a jury, but must further be decided by unanimous verdict. *See Andres v. United States*, 333 U.S. 740, 748-49 (1948); Fed. R. Crim. P. 31(a); *see also Johnson v. Louisiana*, 406 U.S. 356, 369 (1972) (Powell, J. concurring) (defendants in federal courts entitled to unanimous verdict).

Charging a jury that proof of either of two separate elements may stand as the basis for a conviction, as was done in this case, further implicates the problem of equipoise – six jurors may have been convinced that the prosecution had proved that the conspiracy only involved cocaine powder while the other six may have been convinced that the proof supported conviction of a conspiracy regarding cocaine base alone. Such a jury would not have agreed unanimously that the Government proved beyond a reasonable doubt the necessary

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[14] Amicus contends that any conviction on a disjunctive dual object conspiracy is void and therefore any sentence based on such a conviction is likewise void. Even if this result is not dictated, however, the structure of the United States Sentencing Guidelines would likewise preclude sentencing as the charge of conviction must be determined before the sentencing determination may begin. *See* U.S.S.G. 1B1.2.

object of the conspiracy. As noted above, the court below would accept this lack of a final verdict and snatch the power of final decision for itself. *See Edwards*, 105 F.3d at 1182 ("as long as the jury finds that the defendants conspired to distribute *any* drug . . . , the judge possesses the power to determine which drug and how much") (emphasis original).

Such a broad reading of the power of the Government to charge and of the courts to decide has serious implications for the future of criminal prosecutions in this country. Under the lower court's rationale, in the conspiracy context there need be only the general charge of "crime" which will be charged by the government and determined by the judge without notice or opportunity to defend and without the primary protection of trial by jury of all elements beyond a reasonable doubt. In short, the conclusion urged by the lower court defies history, the plain language of the statutes and would eviscerate several provisions of the Fifth and Sixth Amendments to the United States Constitution. Therefore, the lower court's holding must be reversed and the petitioners retried under a sufficiently charged indictment before an appropriately charged jury.

CONCLUSION

Conspiracy crimes are defined by the specific agreement of the conspirators. This fundamental principle of this unique crime has been understood by courts in our legal tradition for nearly four hundred years. The constitutional requirements of adequate pleading and proof are all that prevents the law of conspiracy from slipping into an unregulated and general punishment scheme.

In the instant case, the plain language of the statutory conspiracy crime, viewed in light of tradition and the constraints of the Constitution, requires that the specific type of controlled substance, which is the necessary object of the agreement, be pleaded and proved before any conviction may be deemed valid. Thus, any indictment alleging a §846 conspiracy must plead with specificity which controlled substance is the object of the agreement and a jury must be empowered only to return a verdict on such a specifically charged offense. Any other conclusion would fundamentally disrupt the careful balance between the powers of the Government and the protections afforded the people that it seeks to punish.

Respectfully submitted,

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